

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

GIFT TAX REFERENCE No 9 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO
-

COMMISSIONER OF GIFT-TAX

Versus

DIPAK A. SHETH

Appearance:

MR AKIL QURESHI FOR MR MANISH R BHATT for Applicant.
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 26/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred at the instance of the Commissioner of Gift Tax, the following question of law for the opinion of this Court :

"Whether in law and on facts the gift of
Rs.1 lakh was not taxable under the
provisions of Gift Tax Act,1958?"

2 The assessment year is 1982-83 and the relevant accounting period is year ended on 31/3/1982. On 28/12/1982 the assessee filed return of gift showing the value of taxable gift of Rs.29,180/-. In the said return of income the assessee also claimed exemption under section 5(1)(ii) of the Gift Tax Act,1958 (hereinafter referred to as 'the Act') in relation to a sum of Rs.1 lakh gifted by him at Srinagar. The say of the assessee was that as the gift had taken place in the State of Jammu and Kashmir it fell outside the scope of Gift Tax Act by virtue of provisions of Section 5(1)(ii) of the Act. Some undisputed facts are : that the assessee had transferred a sum of Rs.1,05,000/- from his Bank Account at Ahmedabad to the saving Bank Account with State Bank of Maharashtra, Srinagar Branch. The amount was withdrawn in Srinagar and handed over to the donee. The assessee produced a certificate from the Bank Manager to the effect that both donor and the donee were physically present in Srinagar when the gift was effected. The donee deposited the amount in its account in the same bank at Srinagar. According to the Gift Tax Officer as the amount was transferred from Bank at Ahmedabad and sent by Demand Draft to Srinagar it could not be stated that it had the character of movable property situate outside the territories to which the Act extended and hence exemption under section 5(1)(ii) of the Act was not applicable. The order of the Gift Tax Officer was confirmed by the Appellate Assistant Commissioner.

3 Being aggrieved the assessee went in appeal before the Tribunal and the Tribunal after hearing both the sides recorded the findings as : firstly, that the amount of Rs.1 lakh which had been gifted was clearly movable property situate in Jammu and Kashmir; secondly, the gift was made and accepted in the State of Jammu and Kashmir; thirdly, on the basis of certificate dated 29/3/1982 issued by Manager, Bank of Maharashtra, Srinagar Branch it was held that both the donor and the donee were physically present in Srinagar. Lastly, the transaction of gift effected by the assessee was within the framework of law and could not be termed as dishonest

and dubious and hence the ratio of Supreme Court decision in the case of McDowell & Co.Ltd. vs.CTO, 154 I.T.R.148 would not apply to the facts of the case.

4 We have heard Mr.Akil Qureshi, learned Counsel for the Revenue. Though served, none appears on behalf of the respondent-assessee.

5 The provisions of the Act as are relevant to the controversy at hand are :

"Short title, extent and commencement.

1(1) xxx xxx xxx

(2) It extends to the whole of India except the State of Jammu and Kashmir."

xxx xxx xxx

Exemption in respect of certain gifts.

5.(1) Gift-tax shall not be charged under this Act in respect of gifts made by any person -

(i) of immovable property situate outside the territories to which this Act extends;

(ii) of movable property situate outside the said territories unless the person -

(a) being an individual, is a citizen of India and is ordinarily resident in the said territories, or

(b) not being an individual, is resident in the said territories during the previous year in which the gift is made;"

6 The Tribunal has analysed the aforesaid provision and recorded a finding of fact that the conditions necessary for applying the said provision stand fulfilled. As can be seen the Act would not extend to the State of Jammu and Kashmir which is an exception in as much as the Act is otherwise applicable to the whole of India. Section 5(1(ii) states that gift of any movable property situate outside the whole of India except Jammu and Kashmir would not be charged to Gift Tax under the Act. However, further exception is carved out that in case of an individual who is citizen of India if he is ordinarily resident in India he would be excluded

from the exemption clause. To put it differently, an individual who is a citizen of India and is ordinarily resident of India, if he makes gift of a movable property outside India even then he would be charged to Gift Tax Act. Mr.Qureshi addressed us at great length on the aspect of the assessee's residence and sought to impress upon us that the assessee does not fulfill the criterion laid down by the exemption clause and hence we should hold that the Tribunal was in error in holding that the gift of Rs.1 lakh was not taxable under the provisions of the Act.

7 On a plain reading of the provision, the contention raised by Mr.Qureshi deserves to be accepted and we would have done so but for the facts which have come on record and remain uncontroverted. The Tribunal in para 4 of its order has specifically recorded the contention raised on behalf of the assessee to the effect that the donor in this case is a person who is a resident but not ordinarily resident for the purpose of Income Tax as well as Gift Tax Act. (Emphasis supplied). On behalf of the revenue, this fact was not controverted before the Tribunal. While dealing with the provisions of the Act in para 7.1 of its order the Tribunal has stated that "the provisions of the Act are not to extend to Jammu & Kashmir in respect of an individual who is a citizen of India and is resident but not ordinarily resident in the taxable territories". The Tribunal could have worded this finding more accurately. However, in the facts of the case this aspect is borne out from column No.4 of the assessment order (page 1) wherein the Gift Tax Officer has recorded as under :

"4. Resident	

Whether-Resident butnot ordinarily resident	R but not OR

Non-resident "	

There is no dispute regarding all other criterion laid down in S.5(1)(ii) of the Act being satisfied.

8 Thus, admittedly all the conditions necessary for claiming exemption under section 5(1)(ii) of the Act stand fulfilled. In our view the Tribunal was therefore justified in law in holding that the gift of Rs. 1 lakh was not taxable under the provisions of the Act. The question referred to us is therefore answered in the affirmative i.e. in favour of the assessee and against the revenue.

9 The reference stands disposed of accordingly with
no order as to costs.

(M.S.Shah, J) (D.A.Mehta, J)

m.m.bhatt